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PROPOSED DECISION

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10/31/2013 Item 25

Decision **PROPOSED DECISION OF ALJ VIETH** (Mailed 10/1/2013)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The Acton Town Council, Complainant, vs. Southern California Edison Company (U338E), Defendant.	Case 12-09-002 (Filed September 5, 2012)

DECISION GRANTING, IN PART, MOTION TO DISMISS AND RESOLVING AMENDED COMPLAINT AS A MATTER OF LAW

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DECISION GRANTING, IN PART, MOTION TO DISMISS AND RESOLVING AMENDED COMPLAINT AS A MATTER OF LAW

1. Summary

After review of the motion to dismiss filed by Southern California Edison Company (SCE), other relevant pleadings and controlling authority, we find no disputed issues of material fact and thus, no legitimate reason to hold evidentiary hearing. Thus, we find that all issues raised in the amended complaint filed by the Acton Town Council may be decided as a matter of law. We grant SCE's motion to dismiss as to all allegations in the amended complaint except the allegation concerning the application of Sporax to prevent annosus root disease. On this issue we find that the Mitigation Monitoring Plan adopted by Decision 09-12-044 clearly requires Sporax application to freshly cut tree stumps of specified diameter, whether or not the trees are on lands owned by the United States Forest Service. We direct SCE to comply, as detailed herein.

We close this complaint case.

2. Procedural Background

Acton Town Council (Acton) and Jacqueline Ayer (Ayer) filed this complaint against Southern California Edison Company (SCE) on September 5, 2012, and on October 22, 2012, SCE timely filed an answer. By ruling on November 5, 2012, the assigned Administrative Law Judge (ALJ) directed the parties to meet and confer for the purposes of discussing whether to engage in a mediated effort to resolve their differences. Discussions commenced thereafter with the assistance of a Commission-appointed mediator. As the ALJ's ruling required, the parties filed a joint status report on January 25, 2013; they also asked to continue their mediated discussions and to file a subsequent joint status

report. On February 22, 2013, the parties filed a second joint status report, which advised that mediation had proven unsuccessful.

By ruling on March 14, 2013, the ALJ set a telephonic prehearing conference (PHC) for April 17, 2013. The ruling also directed the parties to file PHC statements on specified issues beforehand and to include a joint, proposed schedule. At the PHC, the ALJ granted Acton leave to file an amended complaint to remove Ayer as complainant, add a cause of action concerning ground disturbance within ten feet of a San Diego desert woodrat nest, and if it chose, to amend its allegations regarding over-burdening of easements.[1] Acton filed the amended complaint on April 24, 2013, SCE filed a timely answer on May 9, and the ALJ set a second telephonic PHC for June 13.

Meanwhile, discovery between the parties continued, a discovery dispute arose and ultimately, the parties resolved that dispute without a law and motion hearing. On June 11, 2013, the parties filed a revised proposed schedule and on June 12, the day before the second PHC, SCE filed a motion to dismiss. The second PHC was held as scheduled. Among other things, the ALJ granted Acton an extension of time, to July 2, to file a response to the motion to dismiss, asked several questions of the parties about two of Acton's allegations and authorized them to file and serve a response to those questions. SCE filed a response to the

[1] At the PHC, Acton confirmed that it had retained co-complainant Ayer as its representative in the complaint proceeding. Ayer explained that she and Acton had combined their separate concerns in one complaint and that though she was not an easement holder, her concerns focused on the easement issues while Acton's concerns focused on "[t]he issues pertaining to use of helicopters, biological resource protection, all the other issues that were addressed in the complaint." (April 17, 2013 PHC Tr. at 13.) Later in the PHC discussion, Ayer stipulated that the amended complaint would remove her name and leave Acton as the sole complainant.

ALJ's questions on July 18, 2013. Acton filed a timely response to the motion to dismiss and with leave, SCE filed a reply on July 12, 2013.

On August 2, 2013, the assigned Commissioner filed a scoping memo, pursuant to Pub. Util. Code § 1701.2(a).[2] The scoping memo determined that SCE's motion to dismiss was timely under Rule 11.2 of the Commission's Rules of Practice and Procedure (Rule or Rules) and targeted resolution of the motion as the next step.[3] The scoping memo also observed that because the complaint could no longer be resolved within twelve months of initiation, the Commission would need to consider an extension order, as required by § 1701.2(d). The scoping memo states: "If the motion is denied, either in whole or in part, because material issues of fact remain to be established, the ALJ will set this matter for hearing as soon as practicable." (Scoping memo at 3.) By Decision (D.) 13-08-010, the Commission extended the statutory timeline for resolution of the complaint by eight months, to May 5, 2014.

3. Summary of the Case

Acton's amended complaint alleges that SCE's construction of Segment 6 of the Tehachapi Renewable Transmission Project (TRTP) fails to comply with D.09-12-044 and with various related environmental documents. These include the Final Environmental Impact Report (FEIR), which D.09-12-044 certified, and two attachments to the decision, the CEQA Findings of Fact (CEQA Findings), which D.09-12-044 expressly incorporates, and the Mitigation and Monitoring

[2] Unless otherwise specified, all subsequent statutory references are to the Public Utilities Code.

[3] Rule 11.2 requires that a motion to dismiss be filed "no later than five days prior to the first day of hearing." No hearing had been set at the time the motion was filed.

Plan (MMP), which D.09-12-044 expressly adopts.[4] The amended complaint groups Acton's specific charges against SCE into four areas of concern: (1) unauthorized use of helicopters; (2) failure to properly implement the Commission's Notice to Proceed (NTP) #32; (3) failure to implement mitigation measures to protect biological resources; and (4) a group entitled "other" consisting of two issues, overburdening of easements and failure to remove a billboard from an SCE right-of-way.[5]

SCE's answer to the amended complaint and its motion to dismiss assert that all of Acton's claims fail as a matter of law. Acton disagrees.

4. Commission Practice Concerning Motions to Dismiss

Rule 11.2 specifically recognizes a motion to dismiss "based on the pleadings." (Rule 11.2.) The Commission's review of a Rule 11.2 motion to

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[4] The CEQA Findings are Attachment 1 to D.09-12-044. The California Environmental Quality Act (CEQA) requires that an agency's approval of an EIR (or FEIR) include these separately stated findings of fact. The MMP, developed to reduce the likely environmental impacts identified in the course of environmental review, is found in two places. It is Attachment 2 to D.09-12-044, as well as Appendix G to the FEIR.

[5] The scoping memo characterized the second issue group as alleging "reliance upon the Commission's Notice to Proceed (NTP) #32, which Acton contends issued in violation of the FEIR." (Scoping memo at 2.) However, Acton's response to the motion to dismiss clarifies that Acton is *not* challenging the legality of NTP #32, but rather, SCE's implementation of NTP #32:

> [Acton] does not dispute that Notice to Proceed (NTP) #32 was issued by the Commission in accordance with the Commission's interpretation of the TRTP documents, and that NTP #32 authorized SCE to construct the portion of the Segment 6 that lies within Acton. What [Acton] does dispute is SCE's claim that it has constructed Segment 6 in accordance with NTP #32; in fact SCE has proceeded in a manner that is quite contrary to NTP #32. (Acton response at 16.)

dismiss "is analogous in several respects to a motion for summary judgment in civil practice." (*Westcom Long Distance, Inc. v. Pacific Bell et al*, D.94-04-082, (1994) 54 CPUC2d 244, 249, referring to Rule 56, the predecessor to Rule 11.2.) Like summary judgment procedure, the purpose of a motion to dismiss is to permit determination "before hearing whether there are any triable issues as to any material fact." (*Id.*) In doing so, a motion to dismiss, like a motion for summary judgment, "promotes and protects the administration of justice and expedites litigation by the elimination of needless trials." (*Id.*)

The Commission requires the same kind of showing in a motion to dismiss that the courts require in a motion for summary judgment:

> [T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a *triable issue of material fact." (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850.)*

Review of a summary judgment motion is a three-step process and "[t]he three steps are (1) identifying the issues framed by the complaint, (2) determining whether the moving party has made an adequate showing that negates the opponent's claim, and (3) determining whether the opposing party has raised a triable issue of fact." (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1662.)

These legal standards provide the analytical framework for considering SCE's motion to dismiss.

5. Factual and Legal Contentions in the Pleadings

Section 2.0 of Acton's amended complaint, entitled "Grounds for Complaint," asserts that SCE has violated the terms under which the Commission approved construction of Segment 6 of the TRTP. This summary section characterizes Acton's two broad concerns as SCE's "extensive and insupportable use of helicopters in an established residential area" within Acton and SCE's failure "to implement biological resource preservations and recovery measures within Acton's legally established boundaries"; subsequent sections of the amended complaint identify additional issues. (Amended complaint at 3.)

Below we review each separately identified allegation in the amended complaint together with the factual support and/or argument filed as part of SCE's motion to dismiss, Acton's response and SCE's reply.

5.1. Use of Helicopters

5.1.1. Acton's Allegations; Relief Requested

Section 2.1. of the amended complaint describes, in subsections 2.1.1. through 2.1.3., three types of helicopter use that Acton contends D.09-12-044 and the FEIR prohibit on lands that the United States Forest Service (USFS) does not own. The fourth subsection, 2.1.4., sets out Acton's view about permissible helicopter uses on non-USFS lands.

- Transport of Workers and Equipment. Acton alleges that SCE "deploys low-flying helicopters" over Acton's residential area to "deliver workers and equipment to tower sites" in an area of Acton outside the Angeles National Forest, which is "abundantly served by an existing roadway network that lies immediately adjacent to the tower sites." (Amended complaint at 4.)
- Removal of Existing Wire, Structures and Footings. Acton alleges that SCE "has deployed helicopters" over Acton's residential area outside the Angeles National Forest "for the

apparent purpose of removing and relocating wires from existing towers even though the area is abundantly served by an existing roadway network that lies immediately adjacent to the tower sites." (Amended complaint at 5.)

- Staging/Support Areas. Acton alleges that SCE "has installed helicopter staging/support yards and landing zones" in parts of Acton's residential area outside the Angeles National Forest and "has cleared large areas (greater than 400 feet by 100 feet) of mature Juniper Woodland … to affect this purpose." (Amended complaint at 5.)
- Acton's Perspective on Authorized Uses. Acton argues that the FEIR and related environmental documents do not "consider, address, or authorize helicopter construction or any type of helicopter landing facility for Segment 6 construction in Acton" except in the Angeles National Forest and on other lands owned by the USFS. (Amended complaint at 7.)
- Relief Requested. Acton asks the Commission to order SCE to cease "immediately and permanently" the use of helicopters for the purposes alleged above and to revegetate all disturbed staging/support areas. (Amended complaint at 18-19.)

5.1.2. Discussion

SCE admits the first three allegations. SCE's motion to dismiss includes a Separate Statement of Undisputed Material Fact. For each fact, SCE includes a declaration by an SCE employee who avers personal knowledge of the matters set out in the declaration and the supporting documentation attached to it, and has executed the declaration under penalty of perjury. The supporting documentation includes detailed responses SCE provided to data requests from Acton.

The relevant admissions are Undisputed Facts 1, 4 and 5. Facts 1 and 4 affirm that on non-USFS lands SCE has used helicopters for the purposes alleged

and that construction has disturbed juniper woodland.[6] Fact 5 affirms that impacts to disturbed juniper woodland will be mitigated pursuant to two additional documents required by the MMP, a Habitat Restoration and Revegetation Plan (HRRP) and a Habitat Mitigation and Monitoring Plan (HMMP).[7]

These admissions, which respond directly to Acton's first three allegations, meet SCE's burden of production. Acton's fourth allegation, which SCE denies, concerns law, not fact; it is Acton's argument for how it believes the FEIR should be interpreted.

Given SCE's admissions, the burden of production shifts to Acton, which must establish some deficiency or inaccuracy in SCE's admissions that leaves a triable, material fact. It is unclear from Acton's response whether Acton means to contest SCE's admissions or simply to argue that as a matter of law, those admissions prove the violations alleged. If Acton intends the former, its response (including the attachments to the response) does not meet its burden of production. Attachment A to Acton's response, entitled "Factual Allegations Raised by the Acton Town Council Pertaining to Each Concern Addressed in the

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[6] This decision uses the term "juniper woodland" as shorthand. The FEIR biological resources chapter, 3.4, refers to this vegetation community, throughout, as "Mojave Juniper Woodland and Scrub" or "Mojavean Juniper Woodland and Scrub." MMP measure B-1a, which includes a table that lists mitigation ratios for impacts to various vegetation communities, refers to "Mojavean Juniper Woodland and Scrub." (D.09-12-044, Attachment A at A-13.)

[7] MMP measure B-1a provides for an HRRP, prepared by the USFS, to set forth the "plans for restoration, enhancement/re-vegetation and/or mitigation banking" on USFS lands. (D.09-12-044, Attachment A at A-10.) The measure provides for a similar (but not identical) plan, prepared by SCE, for non-USFS lands; SCE refers to this second document as the HMMP, to distinguish it from the USFS-prepared HRRP.

Amended Complaint," consists of a mix of unsupported, unauthenticated factual assertions and statements about the legal significance of D.09-12-044 and the FEIR. Attachment B, entitled "Provisions of Law and Commission Orders Violated by SCE for Each Concern Addressed in the Acton Town Council's Amended Complaint," consists of additional assertions that SCE has violated the Public Resources Code, D.09-12-044 and other authority.

Absent a material, factual dispute, evidentiary hearings serve no legitimate purpose and should not be held. Since Acton has not met its burden to make a prima facie case showing that a triable, material fact exists, the allegations in Section 2.1. of the amended complaint may be decided as a matter of law. Though we cannot ascribe evidentiary value to Acton's Attachment A or B, we consider both as supplemental argument offered in support of Acton's assertion that its position, not SCE's, should prevail as a matter of law.

The fundamental legal issue underlying SCE's helicopter use along Segment 6, together with the associated destruction of juniper woodland, is to what extent, if any, SCE has been authorized to use helicopters as a primary means of construction or to support construction on non-USFS lands. SCE states (in Undisputed Facts 23 and 24) that the Commission's environmental consultants monitor TRTP construction and, as of the date of the motion to dismiss, have not issued any formal citations to SCE in connection with Segment 6 construction (which the current CEQA Project Manager for the TRTP has confirmed). In this context, however, the lack of citation cannot be deemed a complete defense to Acton's charges. Accordingly, we review SCE's admitted helicopter use against D.09-12-044 and the environmental authority that governs TRTP construction.

At the outset, it is important to understand the purpose of the Commission decision and the certified FEIR, as well as their relationship. D.09-12-044 constitutes the Commission's discretionary action under CEQA. D.09-12-044's Ordering Paragraphs 1 and 2, respectively, grant SCE a certificate of public convenience and necessity (often referred to as a CPCN) to build the version of the project referred to as the Environmentally Superior Alternative and certify the FEIR. Pursuant to the CEQA Findings, the Environmentally Superior Alternative represents "the least environmentally damaging alignment" among the many alternatives studied. (D.09-12-044, Attachment 1 [CEQA Findings] at unnumbered p. 1.) The FEIR constitutes the "informational document" that is the source of required environmental review, conducted to "inform public agency decisionmakers and the public generally of the significant environmental effect of a project, identify possible ways to minimize the significant effects, and describe reasonable alternatives to the project." (CEQA Guidelines § 15121, Cal. Code Regs. tit. 14 (2013).)

The FEIR for the TRTP is based on SCE's preliminary engineering, which is typical of projects the Commission reviews. The "Note to Readers" in the overview to the FEIR's chapter 2 states (and reiterates) this point clearly:

> Please note that all mileage numbers provided in this [Environmental Impact Report/Environmental Impact Statement] EIR/EIS are based on the preliminary engineering completed by SCE as part of their Proponent's Environmental Assessment (PEA), and refined through the development of this document, and do not reflect mileage variations due to topography and other elements that affect transmission segment lengths. In addition, all estimates of construction equipment and workforce, land disturbance, construction waste, schedules, etc., are based on preliminary engineering data and, therefore, are subject to change based on final engineering. (FEIR at 2-2.)

As the appellate court has recognized, "final design engineering and construction plans are always done after conditional project approval and are often driven by the conditions of approval." (*Dry Creek Citizens Coalition v County of Tulare (1999)*, 70 Cal. App.4th 20, 35.) Moreover, environmental review under CEQA does not require the level of detail that Acton appears to seek. The appellate court has explained:

> CEQA requires a "general description" of the technical aspects of … the project. The description must contain sufficient detail to enable the public and the decisionmakers to understand the environmental impacts of the proposed project. The description cannot narrow the scope of the environmental review or minimize the project's impacts on the environment. (*Dry Creek Citizens Coalition v County of Tulare*, 70 Cal. App.4th 20, 36.)

Thus, the FEIR is not, and is not required to be, a blue print for construction, whether the construction task concerns the removal of old transmission infrastructure or the installation of new. The FEIR underscores this point further in the general discussion (2.2.12.1.) on transmission line construction:

> The exact method of construction employed and the sequence with which construction tasks occur would be dependent upon final engineering, contract award, conditions of permits, and contractor preference. In general, construction efforts would occur within accepted construction industry practices. (FEIR at 2-28.)

Similar language appears at multiple other places in the FEIR.[8]

[8] Footnote 63 of SCE's motion to dismiss cites other examples so numerous that they fill three-quarters of the page with single-spaced, very small type.

With respect to helicopters, Acton correctly notes that the FEIR includes numerous specific references to helicopter use within the Angeles National Forest. The USFS expressly requested changes to the Project (through incorporation of Alternative 6) to "utilize helicopter construction within the [Angeles National Forest] to the maximum extent feasible" as a means of minimizing or avoiding other impacts. (D.09-12-044, Attachment 1 [CEQA Findings] at unnumbered p. 3.) The CEQA Findings capture the magnitude (and potential range) of this change:

> [T]he amount of ground-based-construction and *helicopter construction* will be altered as a result of implementing Alternative 6 …The amount of towers removed/ constructed by helicopter will increase from SCE's original proposal of 17 towers with implementation of Alternative 6, which calls for 92 towers to be *constructed by helicopter* … the final number of towers be *removed/constructed by helicopter* in the [Angeles National Forest] will ultimately be determined by the Forest Service … and will fall within the approved range of 17 to 92 towers. (CEQA Findings at unnumbered p. 10, emphasis added.)

Such references to helicopters and construction also appear repeatedly in the FEIR. Generally, this terminology refers to transportation and final placement by helicopter of transmission towers assembled offsite, at least in part, as opposed to ground-based construction onsite.[9]

But Acton mistakenly interprets the express recognition of helicopter use on USFS lands and in the CEQA Findings to preclude use of helicopters elsewhere in Acton and the surrounding area. From a solely practical standpoint, we observe that before helicopter construction can commence on the

[9] The FEIR references standards for tower construction at 2-50.

Angeles National Forest, helicopters must fly in from some other location on non-USFS land and, given the mountainous terrain, at times flight paths over or near at least some part of Acton are likely. Turning explicitly to construction on non-USFS land, however, there simply is no prohibition in the FEIR on the transport of workers and equipment by helicopter, the removal of existing wire, structures or footings by helicopter or the use of helicopter staging and support areas. Moreover, discussion elsewhere in the FEIR about the likely use of other (non-helicopter) construction methods on non-USFS land is not the same as an absolute ban on helicopter use. SCE's motion summarizes this point succinctly, stating that Acton "improperly assumes that the Final EIR must detail every circumstance where helicopters may be used, that any omission is necessarily a prohibition, and that inclusion in one part of the Final EIR means exclusion everywhere else." (Motion to dismiss at 13.)

We do not suggest that a utility's final engineering plans can ignore an FEIR. For example, the MMP includes air quality measure AQ-1j, applicable to the entire Project notwithstanding the requirement to maximize helicopter use in the Angeles National Forest: "Reduction of Helicopter Emissions. Helicopter use will be limited to the extent feasible and helicopters with low emitting engines shall be used to the extent practical." (D.09-12-044, Attachment 2 [MMP] at A-9.) But this measure is not a ban.

Neither do we suggest that the existence of immitigable environmental impacts in certain resource areas means that additional impacts to those resource areas may be incurred without check.[10] Though an FEIR, once certified, may

[10] The certified FEIR finds that the Environmentally Superior Alternative is likely to result in significant unavoidable environmental impacts in several resource areas,

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suffice against minor changes to an approved project, sometimes additional environmental review is warranted. CEQA Guidelines §§ 15162 and 15163 specify the circumstances for preparation of a subsequent or supplemental EIR. However, Acton does not establish that helicopter usage on Segment 6 requires additional environmental review.

Regarding land disturbance, the FEIR explicitly anticipates development of helicopter support yards and helicopter assembly yards on both USFS and non-USFS lands. The FEIR's Table 2.2-7 (Proposed Project Estimate of Land Disturbance – Segment 6) breaks out acreage estimates (the stated range is ± 15%) for land disturbance attributable to various construction activities, including development of helicopter support/assembly yards. This table separately lists estimates for disturbed acreage associated with these kinds of helicopter use, on USFS land and on non-USFS land; it anticipates that all associated disturbances will be restored.

As a matter of law, therefore, we find that all of the allegations in Section 2.1. of the amended complaint must be dismissed. Because we dismiss these allegations, we need not discuss the relief Acton seeks. However, we caution the CEQA Project Manager and our environmental consultants to carefully monitor SCE's helicopter use going forward to ensure that associated air quality and noise impacts do not unreasonably burden the Acton community. Likewise, to avoid unintended, permanent impacts, once construction is complete we expect careful monitoring of the restoration of disturbed areas.

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including short-term air quality impacts, short-term and permanent noise impacts, and short-term and permanent visual resource impacts). These impacts cannot be fully mitigated to a less than significant degree; pursuant to CEQA Guidelines § 15093, D.09-12-044 adopts a statement of over-riding considerations.

5.2. Implementation of NTP #32

5.2.1. Acton's Allegations

Acton ties the next group of allegations, in Section 2.2. of the amended complaint, to SCE's implementation of the Commission's NTP #32, which permitted SCE to commence construction of Segment 6. Acton's response clarifies that these allegations stem from Acton's view that SCE has implemented NTP #32 in ways that violate D.09-12-044, the FEIR and other environmental documents. Most of the allegations concern SCE's helicopter use on non-USFS land, which raises a version of the legal issue examined above. However, Acton also alleges that SCE has worked outside the days and hours authorized, thereby exceeding noise restrictions.

Section 2.2. has three subsections, 2.2.1. through 2.2.3. Because subsection 2.2.1. (titled "SCE's Use of Helicopters to Relocate Cables is not Authorized by the TRTP Decision") and subsection 2.2.2. (titled "SCE's Use of Helicopters to Relocate Fiber Optic Cable Violates the TRTP Decision") both exclusively concern fiber optic cable, we address them together.

- Helicopter Use to Relocate Cable/Fiber Optic Cable. Acton describes five instances where SCE allegedly has used helicopters for fiber optic cable construction in violation of D.09-12-044 and the FEIR. Two instances concern the removal of fiber optic cable from specified towers on the existing Rio Hondo-Vincent #1 line and three instances concern the installation of fiber optic cable on specified towers on the existing Rio Hondo-Vincent #2 line.[11]

[11] The Rio Hondo-Vincent #1 line is located along Segment 6 between the Vincent Substation (Acton) and Rio Hondo Substation (Irwindale), and adjacent to the Rio Hondo-Vincent #2 line. As the FEIR provides, once complete Segment 6 will consist of "two roughly parallel circuits constructed to 500-kV standards in the existing ROW

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- Noise Protection Conditions. Acton alleges that SCE has engaged in construction activities outside the authorized hours of "7AM to 7PM Monday through Saturday" and in doing so, has violated the noise protections imposed by the applicable noise ordinance for the County of Los Angeles and therefore, both NTP #32 and the FEIR. (Amended complaint at 9.)
- Relief Requested. Acton asks the Commission to order SCE to cease "immediately and permanently" the use of helicopters for the purposes alleged above and to cease construction "outside the hours of 7AM to 7PM, Monday through Saturday or on any established holiday." (*Id.* at 18-20.)

5.2.2. Discussion

SCE admits that it has engaged in the helicopter construction activities alleged in Section 2.2. of the amended complaint. Again, the relevant admissions concerning helicopter use are SCE's Undisputed Facts 1 and 4, supported by declarations under penalty of perjury and other documentation, as discussed above. Acton's response, which makes no additional, legally-supportable factual showing regarding fiber optic cable removal or installation, does not establish any deficiency or inaccuracy in SCE's admissions. The legal issue that remains--whether this cable removal and installation has been authorized on non-USFS lands—is similar to the one addressed above.

Regarding noise, SCE admits that it has worked on Sundays and outside the hours of 7 a.m. to 7 p.m. on other days. Undisputed Fact 2, which relies upon a declaration under penalty of perjury and other documents, supports this admission. SCE offers Undisputed Fact 3, together with declarations under penalty of perjury and other supporting documents, to detail its efforts to obtain

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from the Vincent Substation … to the southern boundary of the [Angeles National Forest]." (FEIR at 2-16.)

a variance from the County of Los Angeles and to address local concerns. These showings, which meet SCE's burden of production, establish that SCE provided the Los Angeles County Department of Public Works with the documentation the County apparently required and that the County determined to take no formal action on the variance.[12] SCE also states that it has: "(1) re-routed flights to avoid

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[12] Documents supporting SCE's Undisputed Fact 5 include the Dow declaration and attachments and the Nelson declaration and attachments. Among the attachments are four SCE letters addressed to its contact, a senior civil engineer in the County of Los Angeles Department of Public Works, Building & Safety Division. The letters are dated November 14, 2011 (this letter references a "project overview meeting held on September 29, 2011 with representatives of the Co. Department of Public Works, including participants from your office."); January 19, 2012; October 10, 2012; and November 30, 2012.

Also attached are four forms, completed by SCE or its contractor, titled "Request for Exemption Building Construction Noise Los Angeles County Code, Title 12, Chapter 12.12." Each of the completed forms appears to be based on the same, fill-in-the-blank, standard form; the first paragraph of each states: "Permission is hereby requested for performance of construction, repair, or excavation work *between the prohibited hours of 8:00 p.m. and 6:30 a.m. Monday through Saturday and all day Sundays*" (emphasis added). At the bottom of each form is a box, titled "Action of Department of Public Works." Within that box are two, check-the-box options, either "Permission Granted" or "Permission Denied." (See Motion to dismiss, Dow declaration, Exhibit E; Nelson declaration, Ex. D.) This portion of each of the forms is blank -- neither option has been checked.

SCE also has attached an email chain, which includes email between SCE and a senior civil engineer at the Los Angeles County Department of Public Works. Most noteworthy are these portions of the exchange:

> LA County engineer (July 26, 2011): "Attached is a noise variance form which needs to be completed, signed by Edison, and returned to me."
>
> SCE (July 28, 2011): "Can you please acknowledge you've received this package for TRTP Sunday work and that you don't require anything else?"

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the valley immediately south of the Vincent substation when possible; and (2) avoided Segment 6 construction work in the Acton community on Sundays when possible." (Motion to dismiss, Dow declaration at ¶ 10.) Acton's response, which includes no substantiated, additional factual showing, does not undermine SCE's admissions.

Again, absent the existence of a triable issue of material fact, we need not hold hearings. Because we find no disputed, material facts here, we may dispose of all of the allegations in Section 2.2. of the amended complaint as a matter of law.

An NTP is a ministerial determination by Commission staff that a utility may commence a Commission-approved construction project, or some part of it. The NTP issues after staff have reviewed a utility's NTP Request, which must provide an implementable level of detail (typically, based on final engineering) and must document compliance with any preconditions in the Commission's authorization.

NTP #32 is a 13-page letter dated November 8, 2011, and signed by the Commission's former (now retired) CEQA project manager for the TRTP; it permits SCE to commence certain work on Segment 6. NTP #32 does not prohibit removal or installation of fiber optic cable by helicopter; rather, the discussion under the subheading "Telecommunications" expressly mentions use

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> LA County engineer (August 15, 2011): "Your [sic] good to go. It was decided we would stay out of the noise variance issue for this work and that this proposed work is under the jurisdiction of the CPUC." (Motion to dismiss, Dow declaration, Ex. E.)

This inconclusive exchange raises legal issues, not factual ones.

of a "helicopter" several times. (Motion to Dismiss, Nelson declaration, Ex. A [NTP #32] at unnumbered pp. 6-7.) Neither does the FEIR prohibit removal or installation of fiber optic cable by helicopter. Accordingly, these allegations fail, as a matter of law.

Turning to review of the authority that governs noise, we begin with chapter 2 of the certified FEIR and the general description of industry construction practice there (2.2.12.1.):

> Construction activities would generally be scheduled Monday through Friday during daylight hours (7:00 a.m. through 5:00 p.m.). When different hours or days are necessary, SCE would obtain variances, as necessary, from the jurisdiction in which the work would take place. (FEIR at 2-38.)

Chapter 3 of the FEIR addresses noise impacts in greater detail. In particular, Table 3.10-9 (Noise Policy Compliance Table – Construction) indicates the local jurisdiction with construction noise authority along various portions of the TRTP route and includes references to the noise policy applicable in those jurisdictions. For Los Angeles County, the reference listed is Section 12.08.440, Part A of the Noise Control Ordinance of Los Angeles County. Table 3.10-9 states that this noise ordinance "*prohibits construction activities between weekday hours of 7:00 p.m. and 7:00 a.m. or at any time on Sunday or holidays …*" (FEIR at 3.10-25, emphasis added.) The quiet period referenced here begins earlier ends later and lasts an hour and an half longer than the period, 8:00 p.m. to 6:30 a.m., listed at the top of the Los Angeles County variance form discussed in footnote 12. Our cursory review of the Los Angeles County Noise Ordinance,

itself, verifies that both Chapters 12.08 and 12.12 do indeed contain construction noise prohibitions and that the quiet periods are slightly different.[13]

NTP #32 notes that SCE expects to work "from 7:00 a.m. to 7:00 p.m." and has implemented certain associated public information requirements (such a toll-free telephone information line). NTP #32 observes that SCE must obtain a variance for work outside prohibited hours and effectively describes the same quiet period as the FEIR:

> Los Angeles County approval or applicable Municipal Code reference shall be provided to the CPUC *for all future Sunday work or for work outside the hours of 7:00 a.m. to 7:00 p.m. Monday through Saturday*, prior to the commencement of work. (Motion to Dismiss, Nelson declaration, Ex. A [NTP #32] at unnumbered pp. 2, 12, emphasis added.)

SCE argues that the documents offered in support of its Undisputed Fact 3 show its good faith efforts to comply with this aspect of NTP #32 and to implement #32 consistent with D.09-12-044 and the FEIR. Acton argues the contrary.

According to Acton, these documents do not meet legal requirements because they constitute "merely a letter notification of the construction events which requires no formal review or approval." (Acton response at 39.) Acton then adds that SCE "used trickery" by "misinforming the Los Angeles County of Public Works … that this portion of the TRTP was under the auspices of the

[13] The 12-hour ban, from 7:00 p.m. to 7:00 a.m., is in Chapter 12.08 (Noise Control), part 4 (Specific Noise Restrictions), section 12.08.440 (Construction noise). The ten and one half hour ban, from 8:00 p.m. to 6:30 a.m., is in Chapter 12.12 (Building Construction Noise), section 12.12.030 (Construction noise prohibited when). Both sections also ban work on Sundays and both contain various exceptions to the general ban.

USFS" and then "compounded this lie by informing [the County] that the USFS was requiring SCE to use helicopters on weekends and Sundays." (Acton response at 39-40.) Acton's arguments on this issue lack any factual support. They also are confusing and more significantly, they miss the real issue – why the Los Angeles County of Public Works seemingly has declined to exercise its lawful jurisdiction over variances. This issue is all the more puzzling because our CEQA staff advises that the County actually has granted other variances for the Project – and on the same form described in footnote 12 – as recently as September 2011.

While we cannot find on this record that SCE is at fault for the County's inaction, neither should we turn a blind eye to the confusion over jurisdiction and hours. As a condition of SCE's CPCN for the TRTP, SCE must comply with local noise ordinances. Before undertaking any construction activities that will result in construction-related noise during times and days when Los Angeles County prohibits such noise, SCE must obtain a variance from the County. This means, necessarily, that SCE will need to verify with the County which section of the Los Angeles County Noise Ordinance applies to the work SCE wishes to do, given work site location, decibel level, etc.[14] Likewise the Commission, through its staff and environmental consultants, should continue its review of helicopter GPS tracking data to ensure that helicopters avoid the community of Acton during prohibited periods.

[14] Though we make no findings on legal construction of the ordinance, we observe that subsection D of section 12.08.440 appears to acknowledge that other provisions prevail in the event of any conflict with Chapter 12.08.

5.3. Protection of Biological Resources

5.3.1. Acton's Allegations

Section 2.3. of the amended complaint focuses on biological resource protection measures in the MMP and whether construction has complied with requirements for the preparation of the HRRP and the HMMP, the two plans required for restoration of land disturbed by the TRTP construction or for mitigating disturbances in other ways. Subsections 2.3.1. through 2.3.4. identify four things, or categories of things, that Acton contends SCE has done in violation of the biological resources protections and mitigations in the FEIR.

- Special- Status Habitats.[15] Acton alleges that SCE has failed to protect juniper woodland located on non-USFS lands, particularly "large trees and clumps of trees." (Amended complaint at 10.) Acton specifically charges that SCE has rejected project revisions proposed by Acton that would have reduced the loss or degradation of this resource and has cleared excessive tracts of woodland to build unauthorized helicopter landing zones and support yards.
- Vegetation/Habitat Documentation. Acton alleges that SCE has commenced construction within the Acton residential area without first preparing a HRRP. Acton asserts that SCE has stated that it "has no intention of restoring blighted Juniper Woodland within Acton [and] … that TRTP revegetation efforts in Acton would consist merely of spreading a generic "grassland seed mix" in the blighted areas." (Amended complaint at 12.)

[15] Special-status habitats are vegetation communities that are identified as sensitive in local plans, ordinances, or policies, or are considered rare and worthy of consideration and a high priority for inventory by the California Department of Fish and Wildlife (as noted by an asterisk in *List of Vegetation Alliances and Associations. Vegetation Classification and Mapping Program, California Department of Fish and Game* [now California Department of Fish and Wildlife], *Sacramento, CA. September 2010.* [online: http://www.dfg.ca.gov/biogeodata/vegcamp/pdfs/natcomlist.pdf]).

- Annosus Root Disease. Acton claims that SCE has failed to apply Sporax, a fungicide used to control annosus root disease in certain species, "to Juniper stumps outside the [Angeles National Forest] based on an understanding that Sporax treatment is required only on USFS lands." (Amended complaint at 12.)
- San Diego Woodrat Nests. Acton alleges that SCE has failed to either avoid or relocate some San Diego woodrat nests, termed "middens," and argues that the actions and omissions alleged violate the FEIR.
- Relief Requested. Acton asks the Commission to order SCE to: "immediately and permanently cease using specified helicopter landing zones and support yards"; "avoid any future disturbances to Juniper Woodland remaining on non-USFS lands in Acton"; "immediately and properly treat all cut stumps along the entire TRTP" with Sporax; double, to 20 feet, the buffer zone around desert woodrat middens. (Amended complaint at 19-20.)

5.3.2. Discussion

As discussed previously, in Undisputed Facts 1 and 4, together with supporting documents, SCE admits to the alleged helicopter use and to having disturbed juniper woodland, in some cases temporarily and in others, permanently. SCE states that it has attempted to avoid impacts to special-status habitats and documents that is has done so in some instances, but also states:

> An alternative construction route proposed by Acton in or around July 2012 was not feasible for various reasons, including: (1) it involved a road that was only partially completed; (2) it was not a route approved by D.09-12-044 and had not been surveyed and/or analyzed within the Final EIR; and (3) it presented potential engineering constraints given the slope of the terrain involved." (Motion to dismiss, Everett declaration at ¶ 3.)

In Undisputed Facts 6 through 8, together with declarations under penalty of perjury and supporting documents, SCE admits that it has identified on USFS

land the species, number, location, and/or diameter at breast height (DBH) of disturbed native trees with a DBH greater than three inches. On non-USFS land, SCE offers evidence that it has followed the Los Angeles County Oak Tree Ordinance.

With respect to habitat or vegetation documentation, in Undisputed Facts 10 through 12 and 14, together with supporting declarations under penalty of perjury and attached documents, SCE offers evidence that it submitted to the Commission in October 2011 a draft HMMP, applicable to non-USFS lands. This was prior to the commencement of Segment 6 construction. (In September 2010 the USFS issued a draft HRRP, applicable to USFS lands, and subsequently has revised the draft several times.)

Regarding the annosus root disease allegation, SCE admits in Undisputed Facts 16 and 17, together with supporting declarations under penalty of perjury and attached documents, to application of the fungicide, Sporax, to stumps of trees only on USFS lands (where the trees had a DBH of three inches or greater) but not to all such trees on non-USFS lands.

Acton's response to SCE motion does not make a prima facie showing of material, triable fact with respect to the first three allegations, or categories of allegations, in Section 2.3. of the amended complaint.

Regarding the fourth allegation, in Undisputed Fact 19, together with a supporting declaration under penalty of perjury and attached documents, SCE admits that in some instances it has conducted work within ten feet of San Diego desert woodrat middens but offers evidence that it has coordinated reduced buffer zones with the California Department of Fish and Wildlife (CDFW). Acton's response includes, as Attachment D, a photograph of an allegedly disturbed midden, entitled "Photograph Showing SCE's Incursion into Flagged

ESA Area to Cut Down Juniper Sheltering a San Diego Desert Woodrat Midden." The photograph does not carry Acton's burden to raise a disputed, material fact. Even if the Commission were to overlook Acton's failure to offer any authentication of the photograph, and then, were to accept Acton's contention that the photograph shows construction activities within ten feet of a midden, Acton would gain nothing, since SCE already has admitted to construction within a reduced buffer.

In summary, then, because none of these allegations raise material, disputed facts, no hearing is required. We may dispose of them all as a matter of law. Two legal issues underlie this set of allegations. One is helicopter use; we have addressed it above and we need not do so again here. The second is the nature of the resource protections applicable on USFS and non-USFS lands. Since D.09-12-044's grant of construction authority is subject to "all feasible mitigation measures" identified in the FEIR and MMP, we turn to these documents to examine specific mitigation measures. (D.09-12-044, Ordering Paragraph 1.b).)

Regarding special-status habitat, particularly juniper woodland, Acton alleges that SCE has failed to follow specific text in the biological resources chapter of the FEIR:

> The overall approach to mitigation of impacts to special-status habitats is to avoid habitats through redesign of tower locations, spur roads, pulling locations, and staging areas particularly with regards to habitat types containing large tree species, where individual trees or clumps of trees can be avoided. (FEIR at 3.4-124.)

But Acton neglects to include the next sentence in that paragraph: "Where avoidance of impacts is not feasible, SCE shall mitigate through restoration, enhancement, and/or preservation of existing habitats. (*Id.*) As defined in CEQA Guidelines § 15364, "feasible" means "capable of being accomplished in a

successful manner within a reasonable period of time, taking into account economic, environmental, legal social, and technological factors." This language does not support Acton's argument. To be sure, we appreciate that slow-growing junipers are a valuable component of the native habitat. But while SCE is cautioned to take care to minimize trimming or removal, SCE is not banned from doing either. MMP measure B-1a contemplates that both will occur; it specifies mitigation ratios of 1:1 for temporary impacts to juniper woodland on non-USFS land and 1.5:1 for permanent impacts.

Acton's allegation that construction has gone forward without preparation of the appropriate vegetation/habitat documentation fares poorly, as well. By way of context, we observe that the certified FEIR examines likely impacts to biological resources from TRTP construction and concludes that though significant, these biological impacts can be reduced to a less than significant level with mitigation. To mitigate Impact B-1, defined as "Construction activities would result in temporary and permanent losses of vegetation," the MMP identifies mitigation measures B-1a through B-1c. (D.09-12-044, Attachment 2 [MMP] at A-9.) The CEQA Findings adopt these mitigation measures "to avoid or substantially lessen the significant effects on the environment from B-1." (D.09-12-044, Attachment 1 [CEQA Findings] at 78.) Measure B-1a requires preparation of two plans (the HRRP by the USFS and the HMMP by SCE) and, as documented above, this has occurred. Nonetheless, Acton contends that SCE has not complied with measure B-1a. Acton's quarrel appears to be with differences between the two documents based on the following language in measure B-1a:

> The intent of this mitigation measure is to require SCE to restore disturbed sites to pre-construction standards or the desired future conditions per the Los Angeles National Forest … Land Management Plan … On non-Federal lands all protection and replacement measures shall be consistent with

> applicable local jurisdiction requirements, such as the Los Angeles County Oak Tree Ordinance. (D.09-12-044, Attachment 2 [MMP] at A-9 and A-10.)

The significance, put simply, is that preservation and restoration under the Los Angeles County Oak Tree Ordinance focuses upon oak species; it does not require surveys of other native trees. As a matter of law, SCE is not required to conduct USFS-type surveys and studies on non-USFS lands. That does not prevent appropriate mitigation for loss of juniper trees within juniper woodland, however. MMP measure B-1a focuses on community-level revegetation (juniper woodland) and because juniper trees are the main component of this vegetation type, mitigation on non-USFS lands means restoring juniper trees within their original ecological context. The critical measure is the number of acres of juniper woodland affected, not juniper tree counts.

Next we turn to annosus root disease and Sporax application. Measure B-1c provides:

> Treat cut tree stumps with Sporax. All stumps of trees (conifers and hardwoods) 3 inches DBH or greater resulting from activities associated with construction of the Project shall be treated with Sporax according to product directions to prevent the spread of annosus root disease. Only licensed applicators shall apply Sporax. Sporax shall not be used during rain events unless otherwise approved by the CPUC/FS/USACE. (D.09-12-044, Attachment 2 [MMP] at A-15.)

This mitigation measure is unequivocal – Sporax must be applied on both USFS and non-USFS lands to all conifers and hardwoods that are 3 inches DBH or greater, anywhere on the Project. SCE's argument that measure B-1c is inapplicable on non-USFS lands lacks all merit; moreover, it is not at all clear to

us why SCE has not been cited for its failure to comply with this measure.[16] Our concern is magnified because SCE's admission regarding how it has chosen to interpret measure B-1c is not limited to Segment 6. Thus any remedy should apply Project-wide. Given the lack of merit in SCE's position, the costs of the remedy should not be borne by SCE ratepayers but should be borne exclusively by the company's shareholders; SCE must follow approved below-the-line accounting procedures to ensure this ratemaking outcome.

We direct SCE, within 15 days of the effective date of today's decision, to submit directly to the Commission's current CEQA Project Manager (Jason.Coontz@cpuc.ca.gov) and serve on the service list for this proceeding, an effective plan to promptly remedy this failure to comply with MMP measure B-1c. The plan should be science-based and should formulate a best practices solution to prevent the spread of annosus root disease, given the passage of time since the conifers or hardwoods were cut. We direct the CEQA Project Manager to review the plan for compliance with today's decision and to oversee implementation of the plan.

Finally, we examine the legal authority governing construction in the vicinity of San Diego desert woodrat middens. Acton is correct that the MMP's

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[16] In data request responses to Acton on which SCE's undisputed facts about Sporax application rely, SCE appears to suggest that the Commission's NTP #37 confirmed SCE's limited interpretation of measure B-1c to USFS land. One data request response states, "The Commission issued … NTP #37 allowing SCE to proceed consistent with its understanding of Mitigation Measure B-1c for the Notice to Proceed on Segment 6." (Motion to dismiss, Leung declaration, Ex. J.) A subsequent data request response affirmatively states that measure "B-1c is applicable to … USFS lands only." (Motion to dismiss, Leung declaration, Ex. L.) We find no confirmation of SCE's interpretation of measure B-1c in any NTP.

measure B-36 requires pre-construction surveys for the woodrat and where a midden is located, SCE must then follow a series of steps to encourage the animal to leave its nest. SCE has produced evidence that it established a process, with CDFW's approval, to work within a reduced buffer in some situations. As a matter of law, we have no basis to find a violation.

Therefore, with the exception of the annosus root disease/Sporax allegations, all allegations in Section 2.3. of the amended complaint should be dismissed as a matter of law.

5.4. Other Issues

The two final issues raised in Section 2.4. of the amended complaint concern unrelated matters. Acton alleges that SCE's construction in Segment 6 has overburdened existing easements and that SCE has failed to comply with D.09-12-044's direction concerning a billboard on SCE's property that does not conform to local regulations.

5.4.1. Existing Easements

Acton alleges that "Segment 6 construction plans and other SCE documentation present a project which overburdens the existing easements that underlie the project area and is inconsistent with the TRTP project adopted in D.09-12-044." (Amended complaint at 13-14.) Acton then asserts: "It was only after SCE's final Segment 6 construction plans (dated May 2012) became publicly available that the issue of overburdened, insufficient, and inadequate easements and improper structures became apparent." (Amended complaint at 14.) Acton describes three specific concerns, asserting that on at least nine private parcels, construction exceeds the right-of-way width specified in each easement; on at least one parcel, the easement permits only two transmission lines and not a double circuit 500 kilovolt (kV) line plus three smaller lines; and on another

parcel, the purported easement "was signed by an individual who was not the owner of record [and] … had in fact sold the property nearly a year earlier (the deed was recorded in May, 1949)." (*Id.*)

By way of relief, Acton asks the Commission first to review SCE's final engineering plans for Segment 6 within Acton, as well as each of the easements described above, and then to "make a determination whether SCE's construction plans are consistent with the language" of each easement. (Amended complaint at 20.) Next Acton asks for a Commission order that "halts TRTP construction on … all private lands for which the underlying easements are determined to be insufficient … until such time as SCE has secured proper easements." (*Id.*)

SCE's motion to dismiss, like its answer to the amended complaint, argues that Acton's easement allegations are without merit and should be dismissed as a matter of law. It appears, upon review of SCE's motion, Acton's response and SCE's reply, and after tracing the various clarifications the parties raise therein, that three basic arguments remain.

SCE asserts a lack of standing theory, since Acton is not a property owner, easement holder, or easement grantor and therefore, has no legal rights vis-a-vis the disputed easements. Acton's response attempts to address this contention by including, as Attachment C, three signed and dated statements in which the signatory states that he/she is the record owner of the parcel or parcels listed in the statement and that "I expect the Acton Town Council to advocate on my behalf regarding the easement matters raised in the Amended Complaint..." (See Acton response, Attachment C.) Acton refers to these statements as declarations but they are not executed under penalty of perjury in conformance with California law; nor do these statements cover all of the allegedly affected property owners.

SCE also argues that Acton's amended complaint is attempting to litigate allegations in this forum previously raised (and still pending) in its application for rehearing, specifically, that the FEIR improperly made certain design changes to substitute double circuit 500 kV towers for existing single circuit 500 kV towers where congested portions of the TRTP approach the Vincent substation. Acton's response concedes that Acton raised this issue on rehearing for Segment 11 but states that it did not raise the issue for Segment 6 and is raising it here for the first time. Finally, SCE argues that Acton seeks an advisory opinion.

We conclude that Acton's easement allegations fail in this forum. We address the three arguments identified above in reverse order. Like the courts, the Commission does not issue advisory opinions. (*City of Santa Monica v Stewart* (2005) 126 Cal.App.4th 43, 69- 70.) Next, while it is not clear to us which one of two likely objectives the easement holders actually wish to accomplish by these allegations, neither can succeed. First, to the extent they seek to clear title or, desire monetary compensation from SCE under theories that the construction constitutes a taking, their claims must be brought in the superior court. Second, to the extent Acton or the easement holders actually wish to stop the Project, their challenge to the adequacy of environmental review for Segment 6 is raised in the wrong forum,[17] by the wrong means and once again, appears to demand a level of construction specificity from preliminary engineering that CEQA does not require. Because Acton's easement allegations fail for these reasons, we do not

[17] Though the pleadings are unclear, it may be that Acton has filed the easement issues in this forum because the Commission has not acted on its rehearing application. Though property rights disputes are outside this Commission's jurisdiction, statute permits matters within our jurisdiction to be pursued by a petition for a writ of review in the court of appeal or Supreme Court if the Commission has not decided an application for rehearing within 120 days of its filing. (See § 1756(a).)

need to reach the standing issue and decline to do so. As a matter of law, we dismiss Acton's easement allegations.

5.4.2. Non-conforming Billboard

Acton alleges that SCE has failed to comply with D.09-12-044, Ordering Paragraph 7 regarding "removal of a non-conforming billboard on SCE property located in the vicinity of the Vincent substation." (Amended complaint at 16.) Acton states that it has been advised by SCE that: "1) The billboard owner claims to have a prescriptive right to maintain the billboard on SCE's property; and 2) SCE does not have in its possession any contract between the billboard owner and SCE." (*Id.*) Acton asserts, however, that the California Department of Transportation (CalTrans) has permit authority for the billboard and will revoke the permit if SCE requests that CalTrans do so. Thus, the relief Acton seeks is a Commission order directing SCE to notify CalTrans that SCE has not and does not consent "to the placement or maintenance" of the billboard on SCE's property. (Amended complaint at 20.)

SCE's motion to dismiss offers evidence through Undisputed Facts 20 through 22, together with a declaration under penalty of perjury and supporting documents. SCE provides information that the billboard owner is Lamar Outdoor Advertising (Lamar) of Baton Rouge, LA and that through its attorney, Lamar claims a prescriptive right, which it contends it acquired before SCE obtained the parcel in question. As Acton has put forward no additional, factual evidence to undermine SCE's showing, there is no material, factual dispute and no need for hearing. The dispute is a legal one – has SCE complied with D.09-12-044, Ordering Paragraph 7, and if not, what more should SCE be required to do.

Review of Ordering Paragraph 7 indicates that D.09-12-044 required SCE follow up on a number of different things in the Acton area; the billboard is only one of them:

> Southern California Edison shall meet with the Acton Town Council to identify reasonable measures consistent with state law and Commission orders addressing issues of residential access, equestrian trials and improper structures on existing rights of way, and shall file an advice letter setting forth these measures, if any, within six months. (D.09-12-044, Ordering Paragraph 7.)

At the time SCE filed the advice letter that Ordering Paragraph 7 requires, it had not concluded its billboard investigation. It has now. Moreover, in response to the ALJ's PHC query about whether the billboard poses safety issues, SCE's response, filed July 18, 2013, asserts compliance with General Order (GO) 95, the Commission's Rules for Overhead Electric Line Construction. Our Safety and Enforcement Division Staff independently have confirmed that the billboard does not pose a GO 95 violation.

SCE argues, correctly, that D.09-12-044 does not require it to file a lawsuit against Lamar. With respect to the proposed CalTrans relief, Acton has not supplied the specificity or legal analysis which permits review or assessment. We can only suggest that Acton pursue this matter informally with SCE by providing SCE with the allegedly applicable statutes and/or with contact information for knowledgeable personnel at CalTrans. If Acton does so, SCE should follow up in an appropriate manner.

6. Conclusion

For all of the reasons discussed above, we find no triable material facts and determine that Acton's allegations may be decided as a matter of law. After review of the relevant pleadings and controlling authority, we find that SCE's

motion to dismiss should be granted as to all allegations except the single allegation in Section 2.3. of the amended complaint concerning the application of Sporax to prevent annosus root disease. On this issue, the MMP supports Acton. Accordingly, we direct SCE to develop and implement a compliance plan for preventing annosus root disease, as detailed herein. In all other respects, we dismiss the amended complaint.

7. Categorization and Need for Hearings

The Instruction to Answer filed on September 20, 2012 categorized this Complaint as adjudicatory as defined in Rule 1.3(a) and anticipated that this proceeding would require evidentiary hearings. Because we find no disputed issues of material fact, there is no reason to hold evidentiary hearing. We find that all issues raised in the amended complaint may be decided as a matter of law in accordance with today's decision. Therefore, this complaint must be dismissed and the evidentiary determination is changed to state that no evidentiary hearings are necessary.

8. Comments on Proposed Decision

The proposed decision of ALJ Vieth in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on October 21, 2013, and reply comments were filed on October 29, 2013, by SCE and Acton. SCE and Acton argue zealously for changes to the proposed decision.

SCE contends that the proposed decision (1) wrongly holds shareholders responsible for the costs of remediating SCE's failure to apply Sporax on nonfederal lands and (2) erroneously concludes that SCE must comply with local

agency noise ordinances and in particular, those promulgated by Los Angeles County.

Regarding Sporax, SCE's argument is this: its request to Commission staff for issuance of NTP #32 advises that SCE intended to apply Sporax only on Forest Service lands; staff did not object affirmatively and neither does NTP #32 affirmatively require broader application of the fungicide; therefore, SCE acted in good faith in applying the fungicide only on federal lands; consequently, while SCE will perform the remediation the proposed decision requires, ratepayers should pay for it. To clarify the context, first we observe that SCE inserted its Sporax interpretation and intent within a single row in a 12-page table within a separate report (over 100 pages) that is one of several attachments to its 18-page NTPR #32; staff's NTP #32 does not actually mention the Sporax topic at all. Second, compliance with MM B-1c is a condition of the CPCN authority that D.09-12-044 grants to SCE. Were MM B-1c ambiguous, we might countenance SCE's argument, but MM B-1c is not susceptible to any patent or latent ambiguity. We repeat the measure here for ease of reference:

> MM B-1c. Treat cut tree stumps with Sporax. **All stumps** of trees (conifers and hardwoods) 3 inches DBH or greater resulting from activities associated with construction of the Project **shall be treated with Sporax** according to product directions to prevent the spread of annosus root disease. Only licensed applicators shall apply Sporax. Sporax shall not be used during rain events unless otherwise approved by the CPUC/FS/USACE. (D.09-12-044, Attachment 2 [MMP] at A-15, emphasis added.)

We do not think that SCE means to suggest that it may attempt to revise a mitigation measure approved by a Commission decision through the ministerial NTP process, whether via tacit staff agreement with the revision or because of staff's failure to detect the revision. We also find unpersuasive footnote 6 of

SCE's comments, which suggests that requiring shareholders, and not ratepayers, to bear the costs of developing and implementing the remediation program somehow is an extra jurisdictional act by this Commission to set transmission rates. We note that SCE did not have similar concerns when it sought the reverse – Commission "backstop" of rate recovery in last spring's interim decision in this docket, D.13-02-035. We make no substantive change to the proposed decision.

SCE's noise variance argument persuades us to revise the proposed decision to clarify our intent and to provide further guidance. The proposed decision discusses in great detail the factual record that SCE provided in support of its motion to dismiss. In its comments, SCE focuses instead upon the MMP, particularly the following Applicant Proposed Measure (APM), which SCE filed as part of its application:

> MM APM NOI-1. Limit Hours and Days for Construction. SCE would comply with all applicable noise ordinances pertaining to construction hour limitations. In the event that construction must occur outside the allowable work hours, a variance would be obtained. (D.09-12-044, Attachment 2 [MMP] at A-104.)

SCE argues that its application to Los Angeles County for a variance satisfies this measure and adds that requiring SCE to actually obtain a variance is an unlawful delegation by the Commission of its exclusive jurisdiction over construction of the TRTP because with respect to such projects, the County "lacks jurisdiction to regulate construction-related noise activities." (SCE comments at 6.) SCE is correct that the Commission has jurisdiction over utility construction matters that are of a statewide concern and in exercising that authority, the Commission may preempt local jurisdictions that assert conflicting rules and regulations. (See *Harbor Carriers v. Sausalito* (1975) 46 Cal. App. 3d 773,

1975 Cal. App. LEXIS 1810 ***3; *OIR re: Application of CEQA to Jurisdictional Telecommunications Utilities* (2011), D.11-12-054, 2011 Cal. PUC LEXIS 577 *14.) As yet, the situation here does not present such a conflict. D.09-12-044 requires SCE to comply with all mitigation measures in the MMP and measure APM NOI-1 is unambiguous, it requires SCE to comply with local noise ordinances. As the Commission said in D.94-06-014:

> Although the Commission retains paramount jurisdiction over those utility activities which require no "permit" approval by the Commission, it has recognized there is sometimes a good deal of local interest in these activities. Here, the Commission has encouraged local government involvement because these activities are not otherwise reviewed, and local jurisdictions are often in the best position to review certain environmental and aesthetic issues. At the same time, the Commission firmly maintains that local jurisdictions have no authority to disapprove or unduly interfere with utility activities as this would conflict with state regulation of utilities.
>
> In light of the foregoing, the Commission has encouraged utilities to consult and cooperate with local jurisdictions in planning and constructing their facilities. In the decisions implementing GO [General Order] 131, the Commission expressly contemplated local review. (See D.85951 (1976) 80 CPUC 111, 114-5; D.77301 (1970), 71 CPUC 150, 152.) Also, the Commission staff generally recommends that utilities go through the local permit process in instances where the Commission has not formally asserted its approval jurisdiction despite the fact that the local jurisdiction is ultimately without authority to disapprove construction of the facility. (D.94-06-014, (1994) 55 CPUC2d 87, 94-95.)

Had the County denied SCE's variance request, a pre-emption issue might be ripe, but the County has not done so – it simply has declined to act. Therefore we reiterate, if SCE needs to engage in TRTP construction in Los Angeles County during prohibited hours, it must apply for a variance. If Los Angeles County

declines to act, SCE must either work within permitted hours (depending upon the ordinance, either 7:00 a.m. to 7:00 p.m. or 6:30 a.m. to 8 p.m.) or file a writ of mandate to compel the County to issue the variance. Alternatively, in appropriate circumstances, it may request that the Commission exercise prosecutorial discretion under the citation authority approved by Resolution E-4550 and decline to issue a stop work order under Ordering Paragraph 4 of the Resolution. (Resolution E-4550, May 9, 2013, delegates citation authority to Commission staff for noncompliance with Commission decisions granting CPCN and permit to construct authority.)

Acton's comments contend that the proposed decision is both factually and legally erroneous. Acton argues that the Commission should deny all of SCE's motion to dismiss "except the single allegation that [SCE] has failed to comply with easement restrictions on private lands in Acton." (Acton comments, Appendix A, proposed revision to Ordering Paragraph 1.) Apparently Acton is abandoning the easement issue, though in the body of its comments Acton states that the proposed decision wrongly assesses that issue, also. In general, however, the comments largely reiterate the factual and legal claims raised by Acton's prior pleadings. Acton's comments are unpersuasive.

While it is clear that Acton feels inconvenienced and aggrieved by the TRTP construction, Acton has not met its burden to establish the facts needed to support the legal conclusions it asks the Commission to draw. Thus, Acton cannot prevail. To be sure, Acton's pleadings contain many assertions of fact, and Acton may believe those facts to be true, but Acton has not substantiated those allegations in any manner the law may recognize. Assertions of fact are not the same as factual proof.

A formal complaint is an adjudicatory proceeding – the most judicial kind of proceeding at the Commission and one not well-suited to resolving in real time the kinds of community concerns raised here. It is unfortunate that the parties did not permit the Commission's Energy Division, early on, to help them address their differences; likewise, it is unfortunate that they were unable to effectively utilize the early opportunity provided them to mediate this dispute.

9. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Jean Vieth is the assigned ALJ in this proceeding.

Findings of Fact

1. The FEIR for the TRTP is based on SCE's preliminary engineering, which is typical of projects the Commission reviews.

2. SCE admits the material allegations of Sections 2.1., 2.2. and 2.3. of the amended complaint except that SCE avers that prior to the commencement of construction on Segment 6, the USFS prepared an HRRP and SCE prepared an HMMP. With respect to Section 2.4. of the amended complaint, SCE avers the things it has done to comply with D.09-12-044, Ordering Paragraph 7.

3. The Los Angeles County Noise Ordinance contains two noise prohibitions: the ban from 8:00 p.m. to 6:30 a.m., Monday through Saturday and all day on Sunday is in Chapter12.8 (Noise Control), part 4 (Specific Noise Restrictions), section 12.8.440 (Construction noise). The ban from 7:00 p.m. to 7:00 a.m. and all day Sundays and holidays is in Chapter 12.12 (Building Construction Noise), section 12.12.030 (Construction noise prohibited when).

4. SCE's admission regarding how it has chosen to interpret measure B-1c is not limited to Segment 6 and therefore, any remedy should apply Project-wide.

5. We find no express confirmation of SCE's interpretation of measure B-1c in any NTP.

6. Given the lack of merit in SCE's interpretation and implementation, Project-wide, of measure B-1c, all costs of the remedy should be borne by SCE's shareholders. SCE should follow approved below-the-line accounting procedures to ensure this ratemaking outcome.

7. Within 15 days of the effective date of today's decision, SCE should submit directly to the Commission's current CEQA Project Manager and serve on the service list for this proceeding, an effective plan to promptly remedy SCE's failure to comply with MMP measure B-1c. This remedial plan should be science-based and should formulate a best practices solution to prevent the spread of annosus root disease, given the passage of time since the conifers or hardwoods were cut.

8. The CEQA Project Manager should review SCE's plan to remedy its failure to comply with MMP measure B-1c, should ensure the remedial plan complies with today's decision and should oversee implementation of the remedial plan.

9. At the second telephonic PHC, the ALJ asked whether the billboard poses safety issues under GO 95 and required SCE to file a response. The Commission's Safety and Enforcements Division Staff independently have confirmed SCE's representation that the billboard does not pose a GO 95 violation.

Conclusions of Law

1. The Commission requires the same kind of showing in a motion to dismiss under Rule 11.2 that the courts require in a motion for summary judgment.

2. SCE's motion to dismiss includes a Separate Statement of Undisputed Material Fact. For each fact, SCE includes a declaration by an SCE employee who

avers personal knowledge of the matters set out in the declaration and the supporting documentation attached to it and, has executed the declaration under penalty of perjury. SCE's admissions meet its burden of production.

3. Given SCE's admissions, the burden of production shifts to Acton to establish some deficiency or inaccuracy in SCE's admissions that leaves a triable, material fact. Attachments A, B and D to Acton's response consist, respectively, of the following: a mix of unsupported, unauthenticated factual assertions and statements about the legal significance of D.09-12-044 and the FEIR; additional assertions that SCE has violated the Public Resources Code, D.09-12-044 and other authority; and an unauthenticated photograph.

4. Acton has not met its burden to raise a triable, material fact with respect to any of the allegations in the amended complaint; therefore, all of the allegations in the amended complaint should be decided as a matter of law.

5. The FEIR is not and is not required to be a blue print for construction.

6. Express recognition of helicopter use on USFS lands in the FEIR and in the CEQA Findings does not preclude use of helicopters elsewhere in Acton and the surrounding area.

7. The FEIR does not prohibit the transport of workers and equipment by helicopter, the removal of existing wire, structures or footings by helicopter or the use of helicopter staging and support areas. Discussion elsewhere in the FEIR about the likely use of other (non-helicopter) construction methods on non-USFS land is not a prohibition of helicopter use on non-USFS land.

8. The FEIR explicitly anticipates that development of helicopter support yards and helicopter assembly yards on both USFS and non-USFS lands will result in land disturbance.

9. CEQA Guidelines §§ 15162 and 15163 specify the circumstances for preparation of a subsequent or supplemental EIR. Acton does not establish a prima facie case that either helicopter usage on Segment 6 or minor design alternation near the Vincent substation requires additional environmental review.

10. SCE's past actions substantially comply with noise variance requirements because SCE provided the Los Angeles County Department of Public Works with the documentation the County required and the County determined to take no formal action.

11. MMP measure APM NOI-1 requires SCE to comply with local noise ordinances and going forward, SCE must verify with the County which section of the Los Angeles County Noise Ordinance applies to TRTP construction and must obtain a variance to work outside the periods where the County prohibits construction-related noise. If the County declines to act on the variance request, SCE may file a writ of mandate to compel the County to issue the variance. Alternatively, in appropriate circumstances, SCE may request that the Commission exercise prosecutorial discretion and decline to issue a stop work order under Resolution E-4550, Ordering Paragraph 4.

12. CEQA Guidelines § 15364 defines "feasible" to mean "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal social, and technological factors."

13. MMP measure B-1a contemplates that trimming or removal of juniper will occur and specifies mitigation ratios of 1:1 for temporary impacts to juniper woodland on non-USFS land and 1.5:1 for permanent impacts.

14. Preservation and restoration under the Los Angeles County Oak Tree Ordinance focuses upon oak species; it does not require surveys of other native

trees. SCE is not required to conduct USFS-type surveys and studies on non-USFS lands.

15. MMP measure B-1c is unequivocal: Sporax must be applied, Project-wide, on both USFS and non-USFS lands to all conifers and hardwoods that are 3 inches DBH or greater. SCE's arguments to the contrary lack all merit.

16. Given CDFW's approval of reduced woodrat midden buffers in some situations, we cannot find that SCE has violated MMP measure B-36.

17. The three statements included as Attachment C to Acton response are not executed under penalty of perjury in conformance with California law and they do not cover all of the allegedly affected property owners.

18. Acton's easement allegations fail in this forum. Like the courts, the Commission does not issue advisory opinions. To the extent the easement holders seek to clear title or, desire monetary compensation from SCE under theories that the construction constitutes a taking, their claims must be brought in the superior court. To the extent Acton or the easement holders actually wish to stop the Project, their challenge to the adequacy of environmental review for Segment 6 is raised in the wrong forum, by the wrong means and once again, appears to demand a level of construction specificity from preliminary engineering that CEQA does not require. Because Acton's easement allegations fail for these reasons, we do not need to reach the standing issue and decline to do so. As a matter of law, we dismiss Acton's easement allegations.

19. SCE argues, correctly, that D.09-12-044 does not require it to file a lawsuit against Lamar to seek to have the billboard removed.

20. With respect to the proposed CalTrans relief, Acton has not supplied the specificity or legal analysis which permits review or assessment here.

21. All allegations in the amended complaint should be dismissed except the single allegation that SCE has failed to apply Sporax to freshly cut tree stumps on non-USFS land.

22. This decision should be effective immediately to provide certainty to the parties and to ensure timely preparation of the plan required by Ordering Paragraph 3.

23. Hearings are not necessary.

24. This complaint should be closed.

O R D E R

IT IS ORDERED that:

1. *Southern California Edison Company's Motion to Dismiss the Amended Complaint* filed June 12, 2013, is granted as to all allegations except the single allegation that Southern California Edison Company has failed to apply Sporax to freshly cut tree stumps on land that the United States Forest Service does not own.

2. All allegations in the amended complaint filed by the Acton Town Council on April 21, 2013, are dismissed except the single allegation that Southern California Edison Company has failed to apply Sporax to freshly cut tree stumps on land that the United States Forest Service does not own.

3. Within 15 days of the effective date of today's decision, Southern California Edison Company (SCE) must submit to the Commission's current California Environmental Quality Act Project Manager at the e-mail address provided in the body of this decision, and serve on the service list for this proceeding, an effective plan to promptly comply with measure B-1c. Given the lack of merit in SCE's position, the costs of the remedy should not be borne by SCE ratepayers but

should be borne exclusively by the company's shareholders. SCE must follow approved below-the-line accounting procedures to ensure this ratemaking outcome.

4. Southern California Edison Company must obtain a variance from the County of Los Angeles (County) prior to undertaking construction in the future during times and days when the County prohibits such work.

5. If the Acton Town Council (Acton) provides Southern California Edison Company (SCE) with citations to the California statutes by which, according to Acton, SCE may request the California Department of Transportation (CalTrans) to withdraw any existing permits for the non-conforming billboard mentioned in Decision 09-12-044, Ordering Paragraph 7, or with contact information for knowledgeable personnel at CalTrans, SCE must follow up in an appropriate manner.

6. The hearing determination is changed to no hearings necessary.

7. Case 12-09-002 is closed.

This order is effective today.

Dated _____, at San Francisco, California.